No. 87-625

IN THE

Supreme Court, U.S.
FILED
OCT 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1987

S.A. SCHAPIRO, appellant

vs

HERITAGE MUTUAL INSURANCE COMPANY
Appellee

ON APPEAL FROM THE COURT OF APPEALS
OF WISCONSIN

APPELLANT'S SUPPLEMENTAL APPENDIX

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STATE OF WISCONSIN

IN SUPREME COURT

Allan Barts

vs ORDER

HERITAGE MUTUAL INS. CO.

VS

S.A. SCHAPIRO

Aug. 18 1987

The Court today announced an order in your case as follows:

No. 86-22;3 Barts v. Heritage Mutual Ins. Co. et al.

A petition for review pursuant to sec. 808.10 having been filed on behalf of appellant - petitioner S.A. Schapiro, and having been considered by the Court,

IT IS ORDERED that the petition is denied with $50 costs.

Heffernan C.J. and Day, J. did not participate.

MARILYN GRAVES Clerk of the Supreme Court

STATE OF WISCONSIN : CIRCUIT COURT
SHEBOYGAN COUNTY

ALLAN BARTS plaintiff

vs DECISION AND ORDER

HERITAGE MUTUAL INS. CO.defendant

On November 21 1983 a hearing was held on the motions after verdict in the above entitled action. Plaintiff appeared by attorney Schapiro and defendant by Attorney Mohr. The Court heard arguments of counsel and took the motions under advisement.

This was an action for damages for alleged bad faith denial of an insurnce claim brought by the insured against his insurance carrier. The verdict consisted of only two questions. One was the liability question which simply inquired whether the defendant exercised bad faith in handling plaintiff's claim and the damage question. Within a half hour after the case was submitted to the jury a unanimous verdict was returned finding

no liability and no damages. Motions after verdict are covered in Sec. 805.14 and 805.16 Stats.

Essentially plaintiff's motions are for a new trial (Sec. 805.16 Stats.). For the most part the arguments made by counsel are a restatement of the motions made at the instruction conference and during the trial when objections to the admission of certain evidence were ruled on after hearing arguments of counsel. The same cases were cited, namely, Meiser v. Aetna Casualty and Surety Co., 8 Wis. 2d 233 and Benke v. Mukwonago Ins. Co., 110 Wis. 2d 356. It was interesting to note that defendant's counsel originally requested a question in the verdict in regard to the policy exclusion "care, custody or control" and plaintiff's counsel objected. Later they switched positions. At any rate the court provided for only one liability question in the verdict which related to bad faith. Counsel for plaintiff now claims that it was error not

to give an instruction and question on "care, custody or control" in accordance with the Meiser case.

During the course of the trial the essential language in Meiser was read to the jury many times and two attorneys, one for each side,testified as to its application to the facts of this case. Attorney Halvorsen,testifying as an expert witness for the plaintiff, said that it applied directly to this case,and Attorney Kloet, testifying as an expert witness for defendant, said that it was distinguisable from the facts of the case and therefore, inapplicable. This situation undoubtedly gave the jury the basis for concluding that the defendant could "reasonably conclude that the claim is debatable or questionable" as they were instructed.

It was concluded at the instruction conference that no separate question be put to the jury in regard to "care, custody

or control", and that no instruction be given in regard to the same. The reasons for this decision were given on the record and those reasons are adopted by reference in this decision. This case did not involve a breach of contract. It was not an insurance coverage question but rather an action based on the tort of bad faith which is an intentional tort. What was material was whether the basis for the denial of the claim by the defendant was reasonably debatable.

Counsel for plaintiff also contends that plaintiff is entitled to a new trial on the grounds that the court failed to instruct the jury in accordance with the language in Benke, supra., 364 and 365, to the effect that a reasonable insurer must conduct a neutral and detached investigation before denying a claim. The Court gave the instruction set forth in Wis. JI - Civil 2761 "Bad Faith by Insurance Company: Assured's Claim" which included the foll-

owing language: "You may consider whether plaintiff's claim was properly investigated, and whether the results of the investigation were given a reasonable evaluation and review". This language adequatedly covered the holding in Benke, supra. The instruction cites Anderson v. Continental Insurance Co.,85 Wis. 2d 675 which case is cited as the authority for the holding in Benke. Benke did not change the law of the tort of bad faith denial of an insurance claim.

As to statements of counsel during the trial when certain objections were made to questions asked of various witnesses, both counsel engaged in excessive argument in the presence of the jury, but to excuse the jury whenever an objection was made would have unduly lengthened the trial. Both counsel can share the responsibility for whatever prejudice, if any, resulted from their statements. The jury was instructed as to how to treat objections of counsel.

The refusal to allow plaintiff's expert to give certain opinions was fully explained at the time of the objections and the explanation is adopted by reference to the trial record.

It was not error to permit defendant's counsel to cross-examine the plaintiff as to how and what he paid his employees. One of the subdivisions of the damage question called upon the jury to decide what loss of business income, if any, plaintiff sustained as a result of defendant's conduct. Such questioning of the plaintiff was directly related to plaintiff's claim for such loss and was relevant, not collateral to one of the issues of the case.

There was sufficient credible evidence to support the jury's verdict.

Plaintiff had the burden of convincing the jury to a reasonable certainty, by evidence which was clear, satisfactory

and convincing that the defendant acted in bad faith in denying plaintiff's claim. Plaintiff did not meet that burden. There was evidence which the jury was entitled to believe that established that the defendant was entirely justified in denying the claim.

Plaintiff's proof of damages was weak. Even though the psychiatrist testified based upon an examination very remote in time from the event that he believed that the defendant suffered emotional distress it was not severe in nature and there was evidence that plaintiff's loss of business was not solely attributable to the denial of the claim. Plaintiff earned more before and after going into business for himself. In addition the jury was not required to accept the opinion of plaintiff's expert medical witness, Dr. Bogost.

Considering the credibleevidence in support of the verdict, it cannot be found to be based on passion or prejudice and it

does not demonstrate perversity on the part of the jury. Plaintiff's motion for a new trial is denied.

In addition both counsel now seek reimbursement from the respective parties for the time of certain expert witnesses who were deposed. Apparently at one point counsel had agreed to absorb the cost of the time of their respective expert witnesses. At this late stage, after trial,it is too late to raise the issue of what are probably offsetting claims. It if was an issue it should have been raised by a pretrial motion, not at the time of motions after verdict.

If plaintiff's counsel believes he is entitled to the return of the witness fee he paid to John Holden he should look to him for repayment. He is not a party to this action.He was excused from appearing as a witness and had another witness bring the document he was subpoenaed to bring to court.

Considering the motions of counsel for defendant, he seeks costs and reasonable attorneys fees on the ground that plaintiff's claim was frivolous pursuant to section 814.025, Stats.

Plaintiff did not establish his claim for punitive damages and that damage claim was dismissed at the close of plaintiff's case. However, the court denied the motion to dismiss plaintiff's claim and ruled that sufficient evidence had been presented to warrant having the case go to the jury. The claim for punitive damages was without merit and can be deemed "frivolous" in nature, but punitive damages is not a claim as such, but is based on whether actual damages are awarded in which case if it is established that defendant's conduct was malicious in nature the jury can award exemplary damages in addition to actual damages.

The frivolous costs statue is based on the entire action being brought in bad faith

solely for the purposes of harassing or malicious injuring another and not simply one of the claims for damages potentially arising out of the action. Accordingly, this court denies defendant's motion for costs and reasonable attorneys fees on the groudns that the action was "frivolous" as that term is defined in Sec. 814.025 Stats.

However, defendant's counsel may add $50 motion costs in connection with the motion relating to the deposition of Robert Halvorsen heard on March 29 1983.

The matter of payment for the time spent by defendant's expert witness at a pre trial deposition has been decided above.

For failure to admit to the genuiness of plaintiff's hospital records without calling the custodian of the hospital records, as a witness, defendant is entitled to be reimbursed the cost of producing the records and the subpoena fee pursuant to sec. 908.03 (6m) Stats.

Defendant's motion for an order for judgment on the verdict, dismissing plaintiff's complaint and cause of action on the merits together with defendant's costs is granted.

Dated December 14, 1983.

BY THE COURT:

/s/ John G. Buchen
Judge